STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Other Civil
File No.: 62-CV-12-4789
Judge: John H. Guthmann

National Council on Teacher Quality,

Plaintiffs,

vs.

Minnesota State Colleges and Universities and Board of Trustees of the Minnesota State Colleges and Universities,

Defendants,

and

Inter Faculty Organization,

Intervenor.

ORDER GRANTING AND DENYING MOTIONS FOR SUMMARY JUDGMENT

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on August 22, 2012, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue were cross motions for summary judgment filed by plaintiff and defendants. Also at issue was a motion to intervene by Inter Faculty Organization, which was uncontested. Nancy B. Hylden, Esq., appeared on behalf of plaintiff. James P. Barone, Esq. appeared on behalf of defendants. Connie L. Howard, Esq., appeared on behalf of the intervenor. Based upon all of the files, records, submissions and arguments of counsel herein, the Court issues the following:

ORDER

1. The motion to intervene by Inter Faculty Organization is **GRANTED**.

2. Plaintiff's motion for summary judgment is **GRANTED** in part and **DENIED** in part as provided herein.

3. Defendants' motion for a summary judgment is **DENIED**.

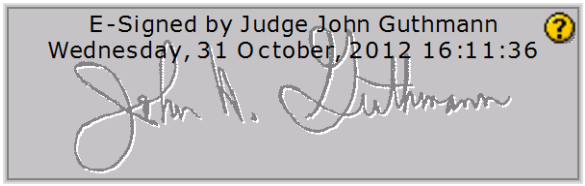
4. Within ten days of the date of this Order, defendants shall provide copies of the requested syllabi to plaintiff. Minn. Stat. § 13.08, subd. 4 (2012). Plaintiff's receipt of the data is conditioned upon its making "fair use" of the data as defined by 17 U.S.C. § 107 (2010). Defendants may charge plaintiff for the requested copies only as authorized by statute, specifically Minn. Stat. § 13.03, subd. 3(c), (e) (2012).

5. Plaintiff's request for costs and attorney's fees is **DENIED**.

6. The following Memorandum is made part of this Order.

Dated: October 31, 2012

BY THE COURT:



John H. Guthmann
Judge of District Court

M E M O R A N D U M

I. STATEMENT OF UNDISPUTED FACTS

A. <u>The Parties</u>.

Plaintiff National Council on Teacher Quality ("NCTQ") is a Washington, D.C.-based nonprofit corporation. (McKee Aff. ¶ 2.) It was founded in 2000 to provide an alternative national voice to existing teacher organizations and build a case for research-based reforms to the educational system. (*Id.*)

Defendant Minnesota State Colleges and Universities ("MnSCU") is a statewide system of post-high school public education entities comprising thirty colleges and seven universities. Minn. Stat. § 136F.10 (2010); (Barone Aff. ¶ 2, Ex. A.) Defendant Board of Trustees of the Minnesota State Colleges and Universities ("MnSCU Board") oversees and operates MnSCU.[1] Minn. Stat. §§ 136F.02, .06 (2010). The MnSCU Board's scope of authority includes compliance with the data-access requirements of the Minnesota Government Data Practices Act ("MGDPA"). *Id*. § 136F.06, subd. 2 ("The board shall have the authority needed to operate and govern the state colleges and universities unless otherwise directed or prohibited by law.").

The intervenor, Inter Faculty Organization ("IFO") bargains exclusively for some 4,000 full and part-time faculty members employed at MnSCU colleges and universities. IFO is a party to a collective bargaining agreement with MnSCU, which agreements are subject to review and ratification by the Minnesota Legislature.

B. <u>Treatment of Course Syllabi by MnSCU and IFO</u>.

The collective bargaining agreement ("CBA") between IFO and MnSCU addresses faculty ownership and control of faculty-created intellectual property:

> A faculty member shall be entitled to complete ownership and control of any patentable discoveries or inventions, or of intellectual property, except where the faculty member's normal workload was reduced for purposes of the development project, or where the inventions or discoveries are produced as a result of agreements or contracts between the university and external sponsors.

(Barone Aff. ¶ 8, Ex. G (IFO Master Agreement MnSCU, Art. 27, § C, subd. 4(a).) The

[1] Throughout this Order, the Court refers to both defendants as "MnSCU" for purposes of convenience.

treatment of course syllabi by the CBA is recognized in policies adopted by MnSCU. MnSCU policy requires faculty members to turn over their syllabi upon request:

> Subpart 4. Dissemination to College or University Administration. The Faculty member shall, upon request, provide a copy of the current course syllabus to the college or university administration according to institutional procedures.

(*Id*. ¶ 9, Ex. H (MnSCU System Procedures § 3.22).) MnSCU also has a policy addressing syllabi ownership:

> Subpart E. **Ownership**. Pursuant to Board Policy 3.26 Intellectual Property and the applicable System collective bargaining agreements, course syllabi are considered scholarly works and are owned by the faculty members who create them, unless other circumstances apply.

(*Id*. ¶ 9, Ex. H (MnSCU System Procedures § 3.22.1) (emphasis in original); *see id.* MnSCU System Procedures § 3.26, Part 4(A)(2) ("Intellectual property rights in scholarly works belong to the faculty member or student who created the works . . . . . Scholarly works include course syllabi . . .").)

C. Events Leading to the Instant Litigation

Consistent with its mission, NCTQ embarked on a national review of educational materials, including course syllabi, produced by teachers at over 1,100 institutions that prepare public school teachers. (McKee Aff. ¶ 3.) The purpose of reviewing course syllabi is not to reproduce, disseminate or make commercial use of them. (*Id*. ¶ 4.) Rather, NCTQ intends to use the syllabi to evaluate course content, pedagogical method and rigor for purposes of researching what teachers need to know and how teachers can be most effective. (*Id*.) Once received, the syllabi are reviewed by two analysts. (*Id*. ¶ 5.) For quality control purposes, copies of syllabi are kept for later reference by NCTQ's

expert analysts. (*Id*.)

NCTQ takes steps to protect the security of the educational materials, including syllabi, it receives from educational institutions. Syllabi are initially uploaded to a secure database. (*Id*. ¶ 6.) Access is limited to NCTQ supervisors and analysts and NCTQ-approved outside researchers. (*Id*.) NCTQ employees and outside researchers must sign a confidentiality agreement. (*Id*.) Outside researchers also agree that they will not use any syllabi for a commercial purpose or publish data beyond that allowed by law for "fair use" as defined by 17 U.S.C. § 107 (2010). (McKee Aff. ¶ 7.) NCTQ also has no problem with schools redacting personal information in any syllabus. (*Id*.)

In September and October 2011, as part of its research project, NCTQ requested certain materials from MnSCU's seven universities, including course syllabi. (*Id*. ¶ 8-9, Ex. 1.) Faculty members at St. Cloud State University consented to the release of their course syllabi and copies were provided to NCTQ along with the other requested documents. (*Id*. ¶ 8.) Following a review of the request, MnSCU responded upon behalf of the other six universities and provided the requested documents with the exception of course syllabi. Per MnSCU's March 7, 2012 letter, the course syllabi were withheld based upon MnSCU's determination that they constituted the intellectual property of their teacher-authors and were not MnSCU's to give absent consent from the faculty member. (Herber Aff., Ex. 1.) Furthermore, MnSCU took the position that its position is consistent with the Minnesota Government Data Practices Act ("MGDPA"). (*Id*.) With regard to all withheld syllabi, MnSCU offered NCTQ a standing opportunity to view, but not copy, the syllabi. (*Id*.)

On March 28, 2012, NCTQ asked MnSCU to reconsider its position. (Herber Aff., Ex. 2.) On April 4, 2012, MnSCU sought a Commissioner's Decision on the issue from the Minnesota Department of Administration Information Policy Analysis Division ("IPAD") pursuant to Minn. Stat. § 13.072 (2010). (Herber Aff., Ex. 3.) MnSCU copied NCTQ with its request and encouraged it to submit its position to IPAD. Instead, NCTQ commenced the instant litigation on or about April 17, 2012. As a result of the pending litigation, IPAD declined the request for an opinion on May 22, 2012.

NCTQ contends that its information request is time sensitive. (McKee Aff. ¶ 11.) Furthermore, it indicates that the research being conducted may be hampered by any further delay in securing the requested information. (*Id*.)

II. SUMMARY JUDGMENT STANDARD[2]

Summary Judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03.) Summary judgment is not appropriate when reasonable minds could differ and draw different conclusions from the evidence presented. *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Strauss v. Thorne*, 490

[2] MnSCU's motion was submitted as alternative motions to dismiss or summary judgment. However, due to the receipt of affidavits containing facts outside the pleadings, all of the motions were treated as Rule 56 motions for summary judgment. Minn. R. Civ. P. 12.03.

N.W.2d 908, 911; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997.)

A party opposing summary judgment may not rely merely on its pleadings but must present specific facts demonstrating there is a genuine issue of material fact. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); Minn. R. Civ. P. 56.05. The court must view the facts in the light most favorable to the nonmoving party. *Id*. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Russ*, 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Once the moving party has established a *prima facie* case that entitles it to summary judgment, the burden shifts to the nonmoving party to present specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001). A genuine issue of material fact exists when a fact may be reasonably resolved in favor of either party. *DLH*, 566 N.W.2d at 69. However, there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue. *Id.* at 71. If any legitimate doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists. *Poplinski v. Gislason*, 397 N.W.2d 412, 414 (Minn. Ct. App. 1986) *rev. denied* (Minn. Feb. 18, 1987).

III. SCOPE OF THE LAWSUIT FOR PURPOSES OF THE MOTIONS

NCTQ's Complaint asserts multiple causes of action. However, at the motion hearing the parties agreed that the action to enforce the MGDPA was sufficient to provide NCTQ with the relief it seeks. Minn. Stat. § 13.08, subd. 4 (2010) (giving any aggrieved

party the right to sue the responsible authority to compel compliance and recover costs and attorney's fees). Accordingly, for purposes of these motions, the Court considers the present litigation to be solely a MGDPA enforcement action. Construction of the MGDPA presents a question of law. *Star Tribune v. City of St. Paul*, 660 N.W.2d 821, 825 (Minn. Ct. App. 2003) (citations omitted).

IV. THE MINNESOTA GOVERNMENT DATA PRACTICES ACT—AN OVERVIEW

Originally enacted in 1974, the MGDPA did not receive its name until 1979. Gemberling & Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From "A" to "Z"*, 8 WM. MITCHELL L. REV. 573, 575 (1982). The statute "attempts to reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. The Act also attempts to balance those competing rights within a context of effective government operation." *Id.* Thus, the MGDPA is a statute that classifies data and, once classified as public, controls how the data may be accessed. *Id*. at 578. According to the Minnesota Court of Appeals, the MGDPA:

> together with statutes such as the Open Meeting Laws, Minn.Stat. Ch. 13D (2002), the campaign finance and public disclosure laws, Minn.Stat. Ch.10A (2002), and public proceedings of the judiciary, are part of a fundamental commitment to making the operations of our public institutions open to the public. In recognition of this policy, the courts construe such laws in favor of public access.

Prairie Island Indian Community v. Minnesota Department of Public Safety, 658 N.W.2d 876, 883-84 (Minn. Ct. App. 2003) (citing *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991)).

Under the MGDPA, all government data falls within one of six categories. Gemberling & Weissman, *supra*, at 579. The statute defines "government data" to mean "all data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7 (2010). Government data may be "data on individuals" or "data not on individuals." The former classification includes:

> all government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual.

Id. § 13.02, subd. 5. "Data not on individuals" is simply "all government data which is not data on individuals." *Id*. § 13.02, subd. 4. In the instant case, MnSCU and IFO make no claim that the syllabi forming the basis for the instant litigation are "data on individuals." Accordingly, the Court will not delve into the complexities and nuances of the statutes and cases that discuss public, private and confidential data on individuals.

"Data not on individuals" may be public, nonpublic or protected nonpublic. Government data is not public if it "classified by statute, federal law, or temporary classification as confidential, private, nonpublic, or protected nonpublic." *Id*. § 13.02, subd. 8a; *see id*. § 13.02, subd. 9 (similar provision defining nonpublic data to mean "data not on individuals that is made by statute or federal law applicable to the data: (a) not accessible to the public . . .."). "Protected nonpublic data" is defined as data not on individuals that is not public according to a statute or federal law applicable to the data. *Id*. § 13.02, subd. 13.

The MGDPA contains an express presumption that all government data is public "unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic . . .. *Id.* § 13.03, subd. 1; *see* Gemberling & Weissman, *supra*, at 580. When a request is made for public governmental data the person "shall be permitted to inspect and copy" the data "at reasonable times and places." *Id*. § 13.03, subd. 3(a). The statute makes no provision for a level of data access less than the right to "inspect and copy."

When a request is made for governmental data:

> [u]nless specifically authorized by statute, government entities may not require persons to identify themselves, state a reason for, or justify a request to *gain access* to public government data. A person may be asked to provide certain identifying or clarifying information for the sole purpose of *facilitating access* to the data.

Id. § 13.05, subd. 12 (emphasis added). However, when responding to a request for data, the agency responsible for the data must allow "[f]ull convenience and *comprehensive accessibility* . . . to researchers including historians, genealogists and other scholars to carry out extensive research *and complete copying* of all records containing government data except as otherwise *expressly* provided by law." *Id*. § 13.03, subd. 2(c) (emphasis added). This section has been described as providing researchers "*carte blanche* access to public data." Gemberling & Weissman, *supra*, at 583 (emphasis in original).

V. THE PROBLEM

It is quite clear from the multiple moving and opposition briefs that neither MnSCU nor IFO claim that the syllabi are nonpublic and therefore inaccessible to NCTQ. In fact, MnSCU concedes that there is a statutory presumption that the syllabi are public

and that a public classification ordinarily means that copies of the requested data must be provided to the requestor. (MnSCU Memorandum in Support of Motion to Dismiss at 4.)

Neither MnSCU nor IFO cite a state statute or rule creating an exception to or limiting NCTQ's right to a copy of the syllabi. The sole authority for their position is the Federal Copyright Act ("FCA"). MnSCU and IFO maintain that the FCA prohibits supplying photocopies of intellectual property owned by a third party, such as the syllabi, to NCTQ. Thus, MnSCU has made the syllabi available for inspection and review, but not copying. In this sense, the case does not involve data access. Rather, the focus is upon how to facilitate access in a manner consistent with the MGDPA.

Based upon the foregoing, the narrow issue faced by the Court is whether the intellectual property protections in the FCA create an exception to the Minnesota Legislature's mandate that documents such as the syllabi are public and comprehensively accessible for copying by researchers. A secondary question is the extent to which the CBA between MnSCU and IFO impacts NCTQ's right to copies of the syllabi. The parties present these questions as matters of first impression in Minnesota's courts.

VI. NOTHING IN THE FCA OVERCOMES THE PRESUMPTION FAVORING THE NCTQ'S RIGHT TO COPIES OF THE SYLLABI

A. Standing Alone, Ownership of the Syllabi Pursuant to a Collective Bargaining Agreement is Irrelevant to the Question of Data Access Under the MGDPA.

According to the CBA, the subject syllabi are owned by the university faculty members. Policies adopted by MnSCU respect and recognize the intellectual property rights addressed by the CBA. As such, MnSCU and IFO suggest that the syllabi cannot

be released to NCTQ absent express consent from each owner-faculty member.

MnSCU's and IFO's argument lacks a legal basis and is wholly at odds with the MGDPA. Faculty members created the syllabi as part of their teaching duties and, therefore, at public expense. They were turned into the university and handed out to students in class. Once the syllabi were "collected", "received, maintained or disseminated" by a MnSCU university, the syllabi became public governmental data as a matter of law. Minn. Stat. §§ 13.02, subd. 7; 13.03, subd. 1 (2010). MnSCU and IFO fail to cite any provision within the MGDPA or a statute governing legislature-approved collective bargaining agreements that changes or affects the classification of otherwise public syllabi created by faculty members at MnSCU institutions.

Short of an express statutory statement, the existence of a collective bargaining agreement governing, or a university policy recognizing, ownership of faculty-created intellectual property is not a data classification within the meaning of the MGDPA. Gemberling & Weissman, *supra*, at 604 ("Although agencies are required to determine the correct classifications for the data they maintain, only a statute, federal law, or temporary classification can actually classify data." (footnotes omitted)). Thus, mere ownership of the syllabi and the right to benefit from them as intellectual property is irrelevant to their classification and public availability under the MGDPA. The CBA between MnSCU and IFO exists subject to the MGDPA, not the other way around. For MnSCU's and IFO's arguments to prevail, something more is needed. That "something" is an express exception in a state or federal law to the presumption that the syllabi are public and subject to copying.

B. Concluding that the FCA is not a Data Classification Statute Does not Necessarily Resolve the Problem.

Recognizing the need for an express exception to the MGDPA, MnSCU and IFO cite the FCA.[3] Furthermore, both MnSCU and IFO state that they relied upon administrative interpretations of the MGDPA to formulate their position that the FCA forbids MnSCU's release of syllabi copies to NCTQ. NCTQ argues that the FCA is a red herring because it is not a data classification statute within the meaning of the MGDPA. Understanding the parties' position requires a working knowledge of the FCA.

The FCA automatically protects an original work of authorship upon its creation regardless of whether the author takes any action to register the work. 17 U.S.C. §§ 102(a); 408(a) (2010). Subject to statutory exceptions, the owner of copyrighted work has the exclusive right to reproduce that work. 17 U.S.C. § 106 (2010). The FCA defines syllabi created by teachers as part of their employment, as "works made for hire":

> (b) Works Made for Hire. - In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Id. § 201(b). The CBA between MnSCU and IFO is an express agreement that transfers ownership rights. By contract, individual faculty members own the syllabi they write.[4]

[3] Neither MnSCU nor IFO cite any other state or federal statute or rule in support of their argument for an exception to the MGDPA presumption that NCTQ is entitled to copies of the syllabi.

[4] The syllabi appear to the Court to be works for hire. The Court also initiated its analysis by drawing on the "works made for hire" section because that is how they are treated in MnSCU's motion papers and because neither the MnSCU policy nor the CBA provision vesting ownership of syllabi in the faculty authors would be necessary if section 201(a) applied. If not works made for hire, syllabi ownership vests automatically in the faculty authors. 17 U.S.C. 201(a) (2010).

Under the FCA, possessing a copy of protected intellectual property does not give the possessor any property right in the contents of the photocopy:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id. § 202. However, as noted above, the FCA carves out exceptions to the property owner's exclusive right to reproduce the work. One exception is "fair use":

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2010).

A review of the FCA demonstrates no attempt by Congress to classify data into public or private categories. Moreover, the FCA makes no attempt to control data access. Instead, the FCA defines and controls the ownership, reproduction and property rights possessed by an owner of defined intellectual property. Hence, the FCA is not a statute containing an "express" provision prohibiting the release of copies of public data within meaning of the MGDPA. If the MGDPA requires a Minnesota governmental entity, such as MnSCU, to release copies of public data, the person or entity receiving the data takes the information subject to the owner's FCA rights. All of the author's rights and remedies under the FCA are unimpeded.

One of the unimpeded rights possessed by the syllabi faculty-authors is the right to sue the State of Minnesota for violating the FCA. MnSCU is understandably concerned that the MGDPA may mandate violation of the FCA if it is construed to force its release of the syllabi to NCTQ. Citing Minnesota Attorney General and IPAD opinions, MnSCU argues that the FCA preempts the MGDPA if copying and release of public third-party-authored data exposes the State of Minnesota to a FCA lawsuit by MnSCU faculty members. The specter of federal preemption arguably renders irrelevant NCTQ's contention that the FCA is not a data classification statute envisioned by the MGDPA.

C. Attorney General and IPAD Opinions Interpreting the Interplay Between the FCA and the MGDPA.

MnSCU and IFO contend that their positions were formulated in reliance upon an opinion of the Minnesota Attorney General and two IPAD opinions that were based upon the Attorney General's opinion. Under the MGDPA, a government entity may seek a

written opinion "on any question relating to public access to government data." Minn. Stat. § 13.072, subd. 1(a) (2010). Any such opinion "must be given deference by a court in a proceeding involving the data." *Id*. § 13.072, subd. 2. However, a "written opinion issued by the attorney general shall take precedence over an opinion issued by the commission under this section." *Id.*

The Attorney General opinion relied upon by MnSCU and IFO was issued on December 4, 1995. The Attorney General was asked by the Commissioner of Natural Resources whether it could require a person seeking to sell government-authored data to enter into a licensing agreement governing subsequent use. Op. Atty. Gen. 852, at 1-2 (Dec. 4, 1995). The Attorney General opined that if the data is protected by the FCA, the agency may impose use restrictions to the extent of its rights under the FCA. *Id*. at 2. In addition, the opinion stated that the agency could utilize a license or authorization agreement to restrict the requestor's authority "to make *additional* copies, to prepare derivative works based upon the copyrighted work, or to distribute copies to the public by sale or other transfer of ownership, or by rental, lease, or lending." *Id*. (emphasis added). But, consistent with the FCA, the agency "may not restrict or condition 'fair use' of the data for purposes such as . . . research." *Id.* Finally, the opinion indicated that the agency "may not assert copyright ownership to deny members of the public their right 'to inspect and copy government data . . .'" *Id.*

Central to the opinion was the Attorney General's conclusion that the MGDPA does not transfer the ownership of FCA-protected public data to the requesting party by virtue of an agency's obligation to copy and provide that data to a requesting party. *Id*. at

6. Moreover, the MGDPA focuses on "access" to data rather than its subsequent use. Therefore, requiring agency compliance with the access and copying requirements of the MGDPA while limiting subsequent use per the FCA "would therefore give effect to both statutes." *Id*. at 7.

While the state may waive or forfeit its FCA rights, the Attorney General applied a different approach to third party owners of data that becomes public. The Attorney General concluded that the state cannot "forfeit [FCA] rights on behalf of third parties." *Id*. at 10-11 n.4. Thus, to the extent "compliance with the MGDPA would compel an actual violation of the FCA, and subject the State to liability, the FCA [preempts state law.]" *Id*. (citing *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995)[5]).

The opinion closed with a warning advising the agency that any licensing or authorizing agreement cannot "restrict the 'fair use' of public government data. *Id.* at 9. The Attorney General recognized that "management of the state's intellectual property raises a number of crucial policy issues" including "what kind of guidelines should state and local government agencies have to interpret concepts like fair use.'" *Id*.

[5] *Chavez* upheld an act of Congress requiring states to waive their Eleventh Amendment immunity from an unconsented-to suit in federal court as a condition to participating in federally regulated activities, such as those embodied by the FCA and the Lanham Act. 59 F.3d at 548. However, after being cited by the Minnesota Attorney General in Opinion 852, *Chavez* was vacated by the United States Supreme Court in light of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). On remand, the Fifth Circuit reversed itself and held that the FCA and Lanham Act neither expressly nor impliedly operated to waive the state's sovereign immunity. *Chavez v. Arte Publico Press*, 157 F.3d 282, 284-85, 291 (5th Cir. 1998). This twist of fate, not mentioned by the parties hereto, does not alter the Court's analysis for several reasons. First, in light of the Court's finding of fair use, the ultimate outcome of this case would not change even if the Court concluded that the rationale of Opinion 852 is no longer valid. Second, "after *Seminole*, the Eleventh Amendment only shields [states] from being sued in federal court." *Id*. at 291. Finally, as noted by the *Chavez* court, state officials may still be subject to federal suits for prospective injunctive relief per the *Ex Parte Young* doctrine. *Id*. In light of the latter two reasons, the Fifth Circuit's reversal of *Chavez* does not materially undermine the rationale of the Minnesota Attorney General in Opinion 852.

MnSCU and IFO also rely upon IPAD opinions 08-009 and 02-012. In the former case, the manuscript of a Minneapolis Park Board-commissioned history became public data when it was furnished to the mayor and members of the Park Board. In the latter case, a citizen sought a copy of copyrighted building plans that had been filed with a city. In each case, the Commissioner, relying upon Op. Atty. Gen. 852, advised that an inspection must be allowed but that copies need not be provided absent permission from the copyright holder. Neither of the IPAD opinions discuss whether release of the data could expose the municipality to a FCA lawsuit or the basis for limiting access to inspection in the face of the MGDPA requirement that copies be provided.

D. <u>The Problem is Solved by Considering Fair Use</u>.

The solution urged by MnSCU and IFO is to limit NCTQ's access to a review of the syllabi, as recommended by IPAD in its opinions. Yet, the IPAD opinions espouse a remedy that has no basis in the MGDPA. Under the MGDPA, data is either private and off limits or public and subject to both review and copying. Although the IPAD opinions say they are based upon Attorney General Opinion 852, the latter opinion never suggested a limited right of review for either state-owned or third-party owned but state possessed intellectual property. Rather, it concluded that the agency could condition its release of a copy of the data upon a use consistent with the owner's FCA rights. Moreover, it warned that the state agency could "not restrict or condition 'fair use' of the data for purposes such as . . . research." Op. Atty. Gen. 852, at 2 (Dec. 4, 1995). Thus, the IPAD opinions are not persuasive. The Attorney General's approach is.

The Attorney General's admonition has merit because if the proposed use is a "fair

use" within the meaning of the FCA, there can neither be a violation of the owner's ownership rights nor a preemption issue, for there is nothing to preempt. In other words, an agency authorizing the fair use of data does not, as a matter of law, forfeit the rights of a third-party owner of the data nor was that agency compelled to violate the FCA.

When NCTQ cited fair use, MnSCU and IFO asserted that section 13.05, subd. 12 of the MGDPA prohibits agencies from seeking the information needed to make a fair-use determination. A plain reading of the cited provision requires the opposite conclusion. According to section 13.05, subd. 12, "government entities may not require persons to identify themselves, state a reason for, or justify a request to gain access to public government data." Minn. Stat. § 13.05, subd. 12 (2012). Here, there is no access issue. All the parties agree that NCTQ is entitled to access. The dispute is over the type of access. The same statute allows the agency to request "certain identifying or clarifying information for the sole purpose of facilitating access to the data." *Id.* Thus, once the agency concludes that data is public within the meaning of the MGDPA, the inquiry turns from gaining access to facilitating access. Section 13.05, subd. 12 does not prevent MnSCU from collecting the information it needs to determine the type of access that should be facilitated.[6]

MnSCU's and IFO's argument that the FCA can be used to bar NCTQ from receiving copies of the syllabi but the FCA fair use exception cannot be considered is

[6] NCTQ focuses on the distinction between information required by an agency and information volunteered by the requestor. The approach is too simplistic. An agency should not be forced to rely on volunteered information that it cannot request and which someone may chose not to offer. The distinction is unnecessary if the plain language of the statute is applied and the agency is free to gather information to facilitate access once the data is classified as public and there is no longer an issue as to whether the requestor may gain access.

both illogical and contradicts the MGDPA. If the FCA applies at all, the entire statute must be considered, including exceptions that permit reproduction of otherwise protected property. MnSCU cannot pick and choose the FCA sections it wishes to apply. Contrary to the IPAD opinions, the Attorney General's opinion harmonizes the FCA with the MGDPA provision mandating "[f]ull convenience and *comprehensive accessibility* . . . to researchers including historians, genealogists and other scholars to carry out extensive research *and complete copying* of all records containing government data except as otherwise *expressly* provided by law." *Id*. § 13.03, subd. 2(c) (emphasis added). Section 13.03, subd. 2(c) is entirely consistent with the FCA fair-use concept. Thus, an agency decision to facilitate access by permitting document review instead of providing document copies cannot be complete until fair use is considered.[7]

NCTQ's motion papers and supporting affidavits addressed and evaluated its contemplated fair use. Neither MnSCU nor IFO submitted an affidavit or legal argument in opposition. They chose not to contest NCTQ's claim that it proposes a fair use as defined by the FCA. After reviewing the statutory fair use criteria and the cases

[7] MnSCU protests that it should not be "caught in the middle of [a fair use] issue that can only be resolved between the Plaintiff and the copyright holder." (Def's. Mem. Opp. Summary Judgment at 6.) The problems with MnSCU's remonstrations are several. First, MnSCU put itself in this position by agreeing to permit faculty ownership of the syllabi. Absent the CBA, the syllabi are likely "works for hire" and owned by MnSCU. The government should not be permitted to limit access to public data by transferring ownership to a third party and then declare its hands are tied. Second, once the syllabi became public data under the MGDPA, MnSCU was statutorily required to make the classification and access decision regardless of data ownership. Minn. Stat. § 13.03 (2010) (responsible authority must classify requested data and make access decision). Finally, through the CBA and MnSCU policies, MnSCU has an interest in protecting the intellectual property rights of its faculty in the same manner as it would protect its own intellectual property in order to avoid an FCA lawsuit or a suit for breach of the CBA. *See* note 5, *supra*. Therefore, MnSCU benefits from making an informed and wise determination. If an agency is uncomfortable making a decision, it has the right to seek an IPAD opinion, request an opinion from the Attorney General, or file a declaratory judgment action naming all interested parties.

interpreting section 107 of the FCA, the Court adopts NCTQ's unopposed analysis set forth at pages 18-23 of its Memorandum of Law and concludes that NCTQ proposes to make no more than a fair use of the syllabi. Per the MGDPA, the FCA and Attorney General Opinion 852, the rights of IFO members are unimpaired as a matter of law if copies of the syllabi are provided to NCTQ subject to making fair use of the data.

Any way this case is analyzed, NCTQ is entitled to the syllabi copies it seeks. Either the FCA is irrelevant because the statute does not classify data or, if the FCA is viewed as preempting the MGDPA, the fair use exception applies to NCTQ's proposed use as a matter of law. In deference to Attorney General Opinion 852, the Court prefers the latter approach. NCTQ's motion for an order compelling MnSCU's compliance with the MGDPA is granted.[8]

VII. NCTQ IS NOT ENTITLED TO ATTORNEY'S FEES

In an action to compel compliance with the MGDPA, the prevailing party may "recover costs and disbursements, including reasonable attorney's fees, as determined by the court." Minn. Stat. § 13.08, subd. 2 (2010). However, an entity "that acts in conformity with a written opinion of the commissioner issued to the government entity" is not liable for attorney's fees. *Id*. § 13.072, subd. 2 (2010).

The attorney's fee provision of the MGDPA uses the term "may." Therefore, an award of fees is not mandatory and rests with the Court's discretion. In *Star Tribune v. City of St. Paul*, 660 N.W.2d 821 (Minn. Ct. App. 2003), the plaintiff prevailed in its data

[8] In light of its ruling, the Court need not consider whether a circumstance exists in which allowing data access through review without providing a copy of the data complies with the MGDPA.

request but the denial of attorney's fees was upheld on appeal. *Id.* at 828-29. In *Star Tribune,* the plaintiff argued that an award of fees should be automatic when the party requesting the data prevails "unless applicable law is clearly unsettled." *Id.* at 829. The plaintiff's position was rejected as beyond the scope of the MGDPA. *Id.*

Here, MnSCU requested an IPAD opinion but the Commissioner closed the file when NCTQ commenced the instant litigation. It is not MnSCU's fault that a case-specific IPAD opinion was never issued. In the Court's view, MnSCU's decision to provide limited access to the syllabi was based in good faith upon a prior Attorney General's opinion and two IPAD opinions. Significantly, all of the parties agree that this case presents an issue of first impression. Since the parties agree that the law governing the issue before the Court is unsettled, the question of fees does not even reach the level of the issue considered and rejected in *Star Tribune*. The motion for an award of fees and costs is denied.

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